

STATE OF MICHIGAN
IN THE SUPREME COURT

JULIE A. PUCCI,

Plaintiff-Appellant,

vs.

CHIEF JUDGE MARK W. SOMERS,
in his individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee

Supreme Court No. 153893

Court of Appeals No. 325052

Wayne County Circuit Court
Case No. 13-014644-CZ

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**GARNISHEE DEFENDANT-APPELLEE
NINETEENTH DISTRICT COURT'S ANSWER TO
PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in holding that Mark Somers, former Chief Judge of the Nineteenth District Court, lacked the unilateral power to indemnify himself for a \$1.1 million judgment entered against him in his individual capacity only based on his wrongful termination of a court employee for personal reasons having nothing to do with court business?

Plaintiff-Appellant answers: Yes.

Garnishee Defendant-Appellee answers: No.

INTRODUCTION

This is a garnishment action in which Plaintiff-Appellant Julie A. Pucci seeks to hold Garnishee Defendant-Appellee Nineteenth District Court (the “Court”) financially responsible for a \$1.1 million judgment entered against one of its former chief judges, Mark Somers (“Somers”), in December of 2011. That judgment flowed from a federal jury verdict finding that Judge Somers violated Ms. Pucci’s Due Process and First Amendment rights by terminating her employment with the Court because he disapproved of a personal romantic relationship that she was having, and because she complained about his practice of espousing his religious beliefs while conducting proceedings from the bench. It is undisputed that the judgment was entered against Judge Somers in his individual capacity only. Indeed, the jury was not even asked to consider an official capacity damage claim. Accordingly, under decades of United States Supreme Court jurisprudence, Judge Somers was solely responsible for the judgment entered against him, and it could be collected only from his personal assets.

Plaintiff offers only a single reason why she should be permitted to disregard this black letter law and garnish the Court for a private financial obligation of Judge Somers. Nine days before the claims against him went to trial, Judge Somers attempted to absolve himself of liability for his personal misconduct by unilaterally adopting a so-called “indemnification policy” purportedly requiring the Court to pay any judgment that was entered against him. The judge who presided over the trial keenly observed that this policy “ought to raise eyebrows,” and the Court of Appeals appropriately found that it was invalid and unenforceable because Judge Somers lacked the autonomous power to require the Court to pay for an otherwise personal liability without the approval of the Court’s funding unit.

Despite Plaintiff's effort to attack it, the decision of the Court of Appeals paves no new legal ground. It is based on established case law from this Court holding that judges, under basic separation of powers principles, may only procure and spend what has been legislatively allocated to them by the funding units of the courts that they serve. If they wish to appropriate additional monies, they cannot do so unilaterally, but must file a lawsuit against their funding unit at which they bear the burden of proof – by clear and convincing evidence – that the funding is required to satisfy a critical judicial need and is essential to the operation of the court. No such action has ever been brought by the Nineteenth District Court, and for good reason: the indemnification of a judge for an individual capacity judgment reflecting personal misconduct is not a critical judicial need. It is a misuse of taxpayer dollars designed to cover a liability unrelated to the business of the Court.

In defiance of these basic legal principles, Appellant contends that the Court of Appeals engaged in “judicial activism” when it struck down Judge Somers’ indemnification policy and made a decision based only on its own “subjective belief” of what the law should be. Application, at 12, 21-22. Nothing in her application for leave support these criticisms. Plaintiff misconstrues virtually every authority on which she relies, entirely ignores the central case on which the Court of Appeals’ decision rests, and creates doomsday scenarios about the purported “chilling effect” of the ruling that have nothing to do with the issue decided and will never come to pass. The bottom line is that the Court of Appeals got it exactly right when it found that Judge Somers had no ability to indemnify himself for his own misconduct. Plaintiff may not seek to collect a personal capacity judgment from the official coffers of the Court: her remedy is against Judge Somers alone. Plaintiff’s application for leave to appeal should be summarily denied.

COUNTER-STATEMENT OF FACTS

A. The Underlying Federal Lawsuit Against Judge Somers

On February 12, 2007, Plaintiff filed a Complaint in the United States District Court for the Eastern District of Michigan against Defendant Mark W. Somers, the City of Dearborn, and the Nineteenth District Court. Plaintiff sued Judge Somers, who was then the chief judge for the Nineteenth District Court, in both his official and individual capacities. The case was assigned to the Honorable David Lawson. Plaintiff alleged in her lawsuit that Judge Somers wrongfully terminated her from her position as deputy court administrator for the Court because her domestic relationship with one of the other judges on the court, without the benefit of marriage, clashed with Somers' religious beliefs. *See Pucci v. Nineteenth District Court*, 565 F. Supp. 2d 792, 796 (E.D. Mich. 2008). She also alleged that Judge Somers terminated her because she complained of his practice of interjecting his personal religious beliefs into judicial proceedings. *See id.* at 797. Ms. Pucci contended that her termination had nothing to do with the business of the Court, and that Judge Somers fired her out of "animus" and in pursuit of his own "personal interests." Third Amended Compl., at ¶¶ 45, 51, 79 (attached as Exhibit A hereto).

On June 14, 2007, the City of Dearborn was voluntarily dismissed from the case as it played no role in the termination decision. On December 16, 2010, after an appeal to the U.S. Court of Appeals for the Sixth Circuit, all of Plaintiff's claims against the 19th District Court were dismissed on sovereign immunity grounds. The damage claims asserted against Judge Somers in his official capacity were dismissed for the same reason. *See Pucci v. Nineteenth District Court*, 628 F.3d 752, 769 (6th Cir. 2010). That ruling left Judge Somers as the sole defendant against Plaintiff's damage claims in his individual capacity only. The damage case

went to trial against Judge Somers in his individual capacity only on June 22, 2011. *See* Opinion and Order Granting Motion to Quash Writs of Garnishment, at 3 (attached as Exhibit B).

On June 13, 2011, just nine days before the start of trial, Judge Somers created a so-called “Civil Liability Indemnification Policy Regarding Administrative Functions” for the Court. That policy stated as follows:

[I]t is the official policy of the 19th District Court that the supervisory personnel identified herein [later defined to include all judges of the Court] shall be indemnified and held harmless for the costs of defending and for any judgment entered against them resulting from any civil action for discretionary administrative decisions made within the scope of his or her authority including decisions regarding the hiring, firing and/or discipline of its employees.

Indemnification Policy, at 1 (attached as Exhibit C). Judge Somers adopted the policy unilaterally, without the approval of the City of Dearborn, which serves as the Court’s funding unit, or any higher court.

Trial of the case against Judge Somers lasted approximately one week. Judge Somers attempted to defend the individual capacity claims against him by suggesting that he terminated Plaintiff pursuant to a broader reorganization of the Court. *See Pucci v. Nineteenth District Court*, 596 Fed. Appx. 460, 475 (6th Cir. 2015). The jury “rejected” that defense. *Id.* On June 30, 2011, it returned a verdict against him in his individual capacity only. Specifically, it found that he had violated Ms. Pucci’s right to procedural due process and retaliated against her for the exercise of her First Amendment Rights by terminating her. *See* Exh. B, at 3. On December 16, 2011, Judge Lawson entered a judgment in the amount of \$1,173,125.30 against Judge Somers, in his individual capacity only, based on the jury’s verdict. *See id.* That judgment included \$200,000 in punitive damages that the jury had awarded against him. *See Pucci*, 596 Fed. Appx. at 466.

B. Plaintiff's Effort to Garnish the City of Dearborn in Federal Court

Following entry of the judgment, Plaintiff appropriately took action to collect from Judge Somers' personal assets, and she is currently garnishing his salary on a periodic basis. On May 15, 2012, however, Plaintiff also attempted to collect from the City of Dearborn by filing a non-periodic writ of garnishment against it in federal court seeking full payment of the judgment. Judge Lawson ultimately quashed that writ, finding that he lacked jurisdiction to entertain it. In his opinion dismissing the matter, however, Judge Lawson found that there was an "important" distinction between individual and official capacity judgments which Plaintiff, by serving a writ of garnishment on the City, had attempted to "elide." Exh. B, at 11. Specifically, he noted that "an award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Id.*, at 12. Judge Lawson also stated that Judge Somers' effort to transfer this personal liability to the Court by adopting a policy indemnifying himself for his own misconduct "ought to raise eyebrows." *Id.*, at 4.

C. Plaintiff's Effort to Garnish the Nineteenth District Court

Plaintiff did not accept Judge Lawson's ruling. Instead, immediately following his decision, she proceeded to domesticate the individual capacity judgment against Judge Somers in Wayne County Circuit Court. *See* Affidavit and Notice of Entry of Foreign Judgment, Nov. 11, 2013, at 1 (attached as Exhibit D). Then, on December 4, 2013, she filed another non-periodic writ of garnishment, this time seeking to collect from the Court, rather than the City, the entire amount of the individual capacity judgment entered against Judge Somers. *See* Request and Writ for Garnishment, at 1 (attached as Exhibit E). The Court objected to the writ on the ground that it could not be held responsible for an individual capacity judgment, and that Judge Somers

lacked the unilateral power to adopt the indemnification policy by which he attempted to transfer this personal liability to the Court.

D. The Decision of the Trial Court

On December 4, 2014, Ms. Pucci and the Court filed cross motions for summary disposition under MCR 2.116(C)(10) seeking a ruling on the issue of the Court's liability as a garnishee defendant. Those motions were heard by the Honorable Robert L. Ziolkowski on November 14, 2014. He took the matter under advisement and ultimately delivered his decision from the bench on November 26, 2014.

Judge Ziolkowski found that the Court was responsible for the entire amount of the unpaid judgment under the indemnification policy adopted by Judge Somers. In so doing, he acknowledged that Judge Somers was "motivated by his own personal bias and prejudice" when he terminated Plaintiff, and that "[i]t might not be the nicest thing to do, to dump your responsibilities and liability onto a funding unit." Trial Court Transcript, at 7, 11 (attached as Exhibit F). However, Judge Ziolkowski determined that Judge Somers had the ability to unilaterally indemnify himself for his own misconduct because he had the power as chief judge to supervise the performance of all court personnel, and thus he was "exercising the authority that was vested in him . . . when he discharged the plaintiff." *Id.* at 10-11.

Judge Ziolkowski granted Plaintiff's summary disposition motion, denied the Court's summary disposition motion, and entered judgment against the Court in the amount of \$1,183,330.96. *See* Order Granting Plaintiff's Motion for Summary Disposition and Denying Garnishee-Defendant's Motion for Summary Disposition (attached as Exhibit G). However, he expressed uncertainty as to whether he had reached the right result. Immediately after he announced his decision, Judge Ziolkowski stated: "I'll be the first one to admit, I may be

wrong,” and he went on to explain that the parties would have to “get some ultimate resolution” from a higher court. Exh. F, at 15-16.

E. The Decision of the Court of Appeals

The Court timely appealed Judge Ziolkowski’s decision to the Court of Appeals. On March 17, 2016, it issued an opinion and order reversing his ruling and remanding the case with instruction to enter summary disposition in favor of the Court. Court of Appeals Decision, at 8 (attached as Exhibit G). The Court of Appeals recognized in its opinion that judges have the power to hire and fire court employees. However, it went on to explain that judges do not have the unilateral ability to compel whatever appropriations they want for any issue that touches upon a personnel decision. The Court of Appeals noted that, under basic separation of powers principles, judges must exercise their employment authority within “the limited dollars appropriated to [them] by the legislative branch,” and they lack the independent ability to procure monies for expenditures that have not been approved by the funding units of the courts they serve. *Id.* at 6-7.

The Court of Appeals found that Judge Somers’ indemnification policy violated these basic rules as he sought to compel Court funding of an individual capacity judgment that the Court had no obligation to pay and which the funding unit had never approved. It held: “While we agree that a Chief Judge can adopt an indemnification policy that covers the court’s court employees and judges while acting in their official capacity [i.e. claims which operate against the Court and impose organizational liability], we do not believe that this power extends to indemnifying judges for liability incurred in their personal capacity [i.e. claims which operate against the individual and are collectable only from personal assets].” *Id.* at 8. Accordingly, the

Court of Appeals concluded that the Court was “not liable” for the judgment and could not be garnished. *Id.*

The Court of Appeals’ eight page decision was careful and well-reasoned. Moreover, it had the opportunity to consider the issues raised by Plaintiff not once, but twice, as Plaintiff sought reconsideration of the decision raising the same arguments that she presents in the instant application. The Court of Appeals rejected Plaintiff’s position on both occasions because there is no legal basis for it. Plaintiff, however, is dissatisfied with the pace of the monies she is recovering through garnishment of Judge Somers’ wages and intent on finding a deep pocket to fund the individual capacity judgment against him. Accordingly, this appeal followed.

STANDARD OF REVIEW

The Court agrees that the instant application for leave presents issues of law that are subject to a *de novo* standard of review.

ARGUMENT

A. The Nineteenth District Court Cannot Be Garnished for a Judgment Entered Against an Individual Defendant in His Individual Capacity Only.

Plaintiff’s effort to hold the Nineteenth District Court responsible as a garnishee defendant for the judgment entered against Judge Somers in his individual capacity only obliterates the difference between official capacity and personal capacity claims. The law is crystal clear that a suit against a public official in his official capacity is merely “another way of pleading an action against an entity of which an officer is an agent.” *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978); accord *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (holding that “the real party in interest in an official-capacity suit is the governmental entity and not the named official”). Such an action imposes liability on the entity

that the official represents, not the individual personally. *See Brandon v. Holt*, 469 U.S. 464, 471-72 (1985).

In stark contrast to an official capacity suit, a claim against a defendant in his or her personal capacity “seek[s] to impose personal liability on a government official for actions he takes under color of state law.” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, “a victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him.” *Id.* at 167-168. That distinction is of critical import to Plaintiff’s ability to garnish the Court because the United States Supreme Court has recognized that “an award of damages against an official in his personal capacity can be executed only against the official’s personal assets.” *Id.* at 166 (emphasis added); *accord Gamble v. Florida Dep’t. of Health & Rehab. Servs.*, 779 F.2d 1509, 1512-13 (11th Cir. 1986) (holding that the difference between official and individual capacity suits “is not mere semantics; the question is whether the plaintiff is reasonably seeking relief from the state coffers or from the individual’s assets”). It may not be collected from the governmental entity that the official serves.

There is no dispute that Plaintiff went to trial against Judge Somers asserting damages in his individual capacity only. Yet once she received an individual capacity judgment that she could execute against his personal assets, she sought to use a writ of garnishment to collect it from the Court’s official coffers. That effort turns decades of Supreme Court jurisprudence about individual capacity judgments on its head and should not be sanctioned by this Court. The judgment entered against Judge Somers may not be collected from the Court.

Although Plaintiff concedes that the judgment at issue in this case was entered against Judge Somers in his individual capacity only, she attempts to confuse the issue by arguing that Judge Somers was liable under § 1983 only because he “use[d] his state-conferred office” to

terminate her. Application, at 14. Thus, according to Plaintiff, he was sued for performing an “official act” as a judge of the Court. *Id.* at 15. Plaintiff suggests, albeit without citing any supporting case law, that this somehow requires the Court to pay the judgment against him.

Plaintiff is wrong. The Court does not deny that if Judge Somers had not been a judge, he would not have been in a position to fire Plaintiff. That fact does not, however, transform the individual capacity judgment into an official capacity judgment. Indeed, Plaintiff’s own authorities recognize that a personal capacity judgment in a § 1983 action is no different than a personal capacity judgment in any other case: it imposes “personal liability” on the individual against whom it is entered. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). If the government official exercises his state-conferred authority in good faith and reasonable reliance on the law, he has nothing to fear because he is entitled to immunity for any individual capacity claim. *See id.* However, the jury found just the opposite here. It determined that Judge Somers abused his power and terminated Plaintiff to advance his own interests and for reasons having nothing to do with the business of the court. In such circumstances, personal liability is entirely appropriate.

B. Judge Somers Lacked the Unilateral Ability Under Basic Separation of Power Principles to Insulate Himself from Personal Liability by Adopting a Belated and Self-Serving Indemnification Policy.

Throughout the litigation of this case, and continuing in her present appeal, Plaintiff has argued that the Court is responsible for the individual capacity judgment against Judge Somers because he unilaterally adopted an indemnification policy requiring the Court to pay it. Notably, that policy was adopted long after the events giving rise to the judgment against him. Judge Somers terminated Plaintiff from her position as deputy court administrator on January 1, 2007, but did not issue the indemnification policy until 4 ½ years later, just nine days before the case against him went to trial. That timing – which Judge Lawson said “ought to raise eyebrows” –

says everything this Court needs to know about his motives in adopting it. Exh. B, at 4. Somers was not acting in his role as chief judge looking out for the best interests of the Court. He was simply pursuing his own personal interests by engaging in a post-hoc effort to insulate himself from liability for prior misconduct in which he had engaged.

Judge Somers lacked the power to take any such action. The sole purpose of the indemnification policy is to require the Court to assume a financial obligation for which it otherwise bears no responsibility. Rather than pay his own judgment, Judge Somers issued a proclamation purportedly requiring the Court to fund it. This Court has repeatedly recognized, however, that the power to procure court funding belongs to the legislature. *See, e.g., 46th Circuit Trial Court v. Crawford County*, 476 Mich. 131, 141 (2006) (holding that the “most fundamental aspect of the legislative power . . . is the power to tax and to appropriate for specified purposes.”). The judiciary is able to compel appropriations for obligations that have not been legislatively approved only in those “rare instances” where there is a “critical judicial need” and “the overall operation of the court, or a constitutional function is in jeopardy.” *Id.* at 142, 147-148. Even then, the power cannot be wielded unilaterally. Rather, the court must institute litigation against its funding unit, at which it bears the burden of proof by “clear and convincing evidence” that the funding it seeks is “both reasonable and necessary to allow [it] to function serviceably in carrying out its constitutional responsibilities.” *Id.* at 149. This is a difficult standard to meet. The Michigan Supreme Court has made clear that a court functions serviceably if its responsibilities can be “carried out in a barely adequate manner.” *Id.* at 150.

In the *Crawford County* case, the chief judge of the 46th Circuit Court brought a lawsuit against the court’s funding unit in an effort to obtain funding for an enhanced pension package that he wanted to adopt for court employees in an effort to boost morale and increase retention.

The Michigan Supreme Court refused to approve the funding, holding that it was not necessary for the court to “function serviceably.” *Id.* at 155. Here, it is undisputed that neither Judge Somers nor any of his predecessors have ever attempted to institute such a lawsuit. The reason is patent: a judge’s effort to indemnify himself for an individual capacity judgment is not a “critical judicial need” that would justify a departure from the normal constitutional separation of powers. *Id.* at 145. It is an abuse of power designed to shift the financial responsibility for personal misconduct from the individual who engaged in that wrongdoing to the taxpayers who had nothing to do with it.

Indeed, there would be no limit to the extent of judicially-compelled appropriations if they could be accomplished by the fiat of a single judicial officer without any checks and balances. A judge cannot procure funding to insulate himself from personal liability for a \$1.1 million judgment arising from misconduct in office any more than he could unilaterally require the court to pay him a \$1.1 million dollar salary. *See Employees and Judge of the Second Judicial District Court v. County of Hillsdale*, 423 Mich. 705, 722-23 (1975) (holding that the use of administrative orders to compel payment of additional compensation to court employees is “inappropriate”). Judge Somers’ effort to compel the Court to satisfy Plaintiff’s judgment against him is beyond the authority of the chief judge and not authorized by law.

The truth of this proposition is borne out by the fact that no other chief judge in the entire State of Michigan has adopted a similar policy, despite Plaintiff’s best efforts to unearth one. She subpoenaed the State Court Administrator’s Office (“SCAO”) in this action for copies of “any and all indemnification policies adopted by and of the judges of Circuit Courts, District Courts (other than the 19th District Court), Probate Courts and Municipal Courts in the State of Michigan.” SCAO’s Response to Plaintiff Pucci’s Subpoena for Documents, at 3 (attached as

Exhibit I). SCAO responded: “None have been identified.” *Id.* The official representative of SCAO later testified at her deposition that no one in her office had ever seen “anything like [Judge Somers’ indemnification policy] before,” and she explicitly told Judge Somers that she had no ability to authorize it. Deposition Deborah Green, at 15, 23-24 (attached as Exhibit J). The reason no such policies exist is that chief judges lack the constitutional power to adopt them. Judge Somers’ effort to indemnify himself is of no legal force or effect.

Notably, despite the fact that (1) the separation of powers principles set forth in the *Crawford County* case are central to the decision issued by the Court of Appeals, and (2) the Nineteenth District Court identified it as the single most important legal authority on the indemnification issue, Plaintiff does not mention the case once in her application for leave. In fact, she cites only two cases in her entire brief that address the separation of powers doctrine at all: *Lapeer County Clerk v. Lapeer Circuit Court*, 469 Mich. 146 (2003) and *Judicial Attorneys Association v. State of Michigan*, 459 Mich. 291 (1998). The first of these authorities has nothing to do with the issue at hand. It simply held that circuit courts may not interfere with the constitutional duty of county clerks to care for and maintain court records. *See Lapeer*, 469 Mich. at 149.

As for the *Judicial Attorneys* case, it only underscores the Court’s position that Judge Somers lacked the unilateral power to require it to fund the individual capacity judgment entered against him. The *Judicial Attorneys* case held that while a judge has the power to make employment decisions, it is “well established both as a practical and a constitutional matter, that in the exercise of its employment responsibilities the judiciary must take into account the limited dollars appropriated to it by the legislative branch in the exercise of the Legislature’s own constitutional responsibility.” *Judicial Attorneys*, 459 Mich. at 302 (emphasis added). Judge

Somers' indemnification policy does not take into account legislative funding decisions. Just the opposite, it seeks to force the Court to assume an obligation for which monies have never been appropriated. In so doing, it infringes upon the constitutionally-allocated responsibilities of the Court's funding unit. Judge Somers lacked the power to require the Court to fund a personal liability, and the policy by which he attempted to do so may not be used by Plaintiff to pursue a garnishment claim.

C. None of the Statutes or Court Rules Cited by Plaintiff Validate Judge Somers' Effort to Indemnify Himself.

In an effort to distract from the core separation of powers deficiency at the heart of her garnishment claim, Plaintiff attempts to cobble together a host of collateral statutes and court rules to offer support for the indemnification policy by Judge Somers. None of them stand for the propositions that she asserts, and none undermine the decision of the Court of Appeals.

1. The Indemnification Policy is Not Authorized by MCL 691.1408(1).

Plaintiff first argues that the indemnification policy is supported by a provision of the Governmental Tort Liability Act which allows for indemnification of government employees.

The statute in question provides:

Whenever a judgment for damages is awarded against an officer, employee, or volunteer of a governmental agency as a result of a civil action for personal injuries or property damage cause by the officer, employer of volunteer while in the course of employment and while acting within the scope of his or her authority, the governmental agency may indemnify the officer, employee, or volunteer to pay, settle, or compromise the judgment.

MCL 691.1408(1) (emphasis added). The Court does not dispute that this statute permits (although it does not require) a "governmental agency" to indemnify its employees when they incur personal liabilities while acting "within the scope" of their authority. Two factors, however, prevent its application here.

First, Judge Somers is not a “governmental agency.” That distinction belongs to the Court. And under the *Crawford County* case, Judge Somers lacked the constitutional power to require the Court to indemnify him for a personal capacity judgment. The authority to perform such an act rests with the Court’s funding unit. Nothing in the indemnification statute or any case interpreting it says otherwise. Accordingly, the Court of Appeals did not “insert qualifying language into the statute” when it found that Judge Somers did not have the power to indemnify a personal capacity judgment. Application, at 12. It simply recognized that he was not the individual authorized to exercise the indemnification power on the Court’s behalf.

This proposition is underscored by *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985), the case cited by Plaintiff in support of her argument under MCL 691.1408. In *Beebe*, the State of Michigan decided to indemnify an officer of the Michigan State Police for a judgment entered against him in his individual capacity. Critically, the State of Michigan is the funding unit for the Michigan State Police. There is a big difference between an indemnification policy adopted by the funding unit of the governmental agency to which it applies, as in the *Beebe* decision, and the “self-indemnification policy” which Somers drafted here on the eve of trial entirely on his own. Plaintiff’s reliance on *Beebe* only demonstrates the error of her position.

Second, the indemnification statute does not authorize Judge Somers’ indemnification policy because he did not act “within the scope” of his authority when he terminated Plaintiff. Indeed, the jury found exactly the opposite. While Judge Somers “leaned heavily on the notion that reorganization was his motive for terminating Pucci” throughout the trial of the underlying case, the jury explicitly “rejected” that defense. *Pucci v. Nineteenth District Court*, 596 Fed. Appx. 460, 475 (6th Cir. 2015). Instead, it accepted Plaintiff’s allegations that the alleged reorganization was a “pretext” and “subterfuge,” and that Judge Somers terminated her because

he was acting out of “animus” and to advance his own “personal interests.” Exh. A, at ¶¶ 45, 51, 79. While Judge Somers had the authority to fire employees for legitimate reasons related to the official business of the Nineteenth District Court, he had no authority to violate Plaintiff’s constitutional rights by terminating her because he did not approve of a personal relationship she was having. Judge Somers acted well outside the scope of his authority as a chief judge, and thus the indemnification statute does not apply.

2. The Indemnification Policy Is Not Authorized by MCR 8.110(C).

Plaintiff also argues that the indemnification policy is authorized by the powers afforded to Judge Somers under MCR 8.110(C), commonly known as the “Chief Judge Rule.” She cites four separate provisions of the rule, none of which support the position she takes.

First, Plaintiff points out that the Chief Judge Rule gave Judge Somers the power to “supervise the performance of all court personnel.” MCR 8.110(C)(3)(d). The Court does not dispute that. As the *Judicial Attorneys* case makes clear, however, there is a plain difference between a judge’s power to oversee court employees and the ability to compel whatever appropriations he or she may desire for any issue that touches upon a personnel decision. *Judicial Attorneys Ass’n v. State of Michigan*, 459 Mich. 291, 302 (1998). This Court has explicitly held that judges lack the latter power. *See id.*

Noe does the case of *Cameron v. Monroe County Probate Court*, 457 Mich. 423 (1998) impose some sort of independent obligation on the Court’s funding unit to pay for any expenses related to the “supervision and administration of court personnel,” as Plaintiff contends. Application, at 20. The *Cameron* case involved a judicial secretary who asserted an employment discrimination claim based on allegations that the judge for whom she worked created a hostile work environment when she announced her intention to marry another court employee.

Critically, the judgment in that case was entered against the court itself. The holding of *Cameron* was simply that “counties are responsible for paying judgments entered against courts in such tort actions.” *Id.* at 429 (emphasis added). No judgment has been entered against the Nineteenth District Court in this case. Plaintiff is trying to force it to pay a judgment entered against Judge Somers in his individual capacity only. Therefore, the *Cameron* case does not empower Judge Somers to indemnify himself, nor does it obligate the Court’s funding unit to appropriate funding for such an expense.

Plaintiff also cites MCR 8.110(C)(3)(f), which gives the chief judge power “to supervise court finances, including financial planning, the preparation and presentation of budgets, and financial reporting.” The very language of the rule proves its limitation here. The fact that a chief judge can “prepare” and “present” a budget demonstrates that there is someone else for whom he or she is doing the preparing and presenting. By statute, that is the funding unit that appropriates the money for the court to operate. *See* MCL 600.8104(2); MCL 600.8121(4).

Plaintiff next points to MCR 8.110(C)(2)(c), which gives judges the power to “initiate policies concerning the court’s internal operations.” But that general language cannot be construed as a back door method for a chief judge to wield financial powers that he otherwise doesn’t have. A judge couldn’t unilaterally require a court to make his car payments for him by calling it a transportation policy, and he can’t require a court to fund a personal litigation expense by calling it an indemnification policy either. Any other result would eviscerate the entire holding of the *Crawford County* decision.

Finally, Plaintiff notes that chief judges have the power to “perform any act or duty or enter any order necessarily incidental to carrying out the purpose of this rule.” MCR 8.110(C)(3)(i). There is no case in Michigan holding that this provision allows judges to

override constitutional separation of powers doctrine. Just the opposite, the Chief Judge Rule itself requires judges to “effect compliance by the court with all applicable court rules and provisions of the law.” MCR 8.110(C)(3)(h). That would include the *Crawford County* decision that Plaintiff so desperately seeks to avoid.

Neither of the cases that Plaintiff cites for a judge’s “broad administrative powers” under the Chief Judge Rule support the indemnification policy either. Application, at 16. In *Schnell v. Baker Furniture Co.*, 461 Mich. 502, 513 (2000), the court simply held that the Chief Judge of the Kent County Circuit Court had the power to “employ creative and energetic means to improve the delivery of justice” by scheduling a week of settlement conferences for the cases on the court’s docket, resulting in a 55% resolution rate that saved months of trial time and taxpayer expense. That case has no bearing on a judge’s ability to appropriate funding or engage in self-indemnification.

The case of *O’Neill v. Nineteenth District Court Judge William C. Hultgren* is similarly inapposite. There, the court ruled “only” that the Chief Judge of the Nineteenth District Court had the power to “administer his budget” by “allocat[ing]” monies that the funding unit had already approved and provided. Pl.’s Exh. M, at 2 n. 2. Judicial spending of monies that have been budgeted and procured is hardly controversial. However, allowing a chief judge to unilaterally appropriate taxpayer funding for new obligations that he seeks to create on his own in order to indemnify himself for personal liabilities is without legal precedent.

3. The Indemnification Policy Is Not Authorized by MCL 600.1405.

Plaintiff next argues that she should be entitled to enforce the indemnification policy as a third party beneficiary under MCL 600.1405. This argument fails for two reasons. First, the statute that she relies upon explicitly states that it applies only where the promise at issue is

“legally binding on the promisor.” MCL 600.1405(2)(a). The indemnification policy is of no legal force or effect and is not binding on the alleged promisor, the Nineteenth District Court, because Judge Somers had no power to adopt it. Plaintiff tries to dodge that issue by arguing that the policy was later ratified by Judge Wygonik. *See* Application, at 19. However, as the successor to Judge Somers, Judge Wygonik did not have the unilateral power to compel court funding of the individual capacity judgment in 2012 any more than Judge Somers did when he tried to adopt the indemnification policy in 2011. Under the *Crawford County* case, he either had to obtain the approval of the funding unit or institute a lawsuit showing that it reflects a critical judicial need. Judge Wygonik, like Judge Somers, did neither.

Second, this Court has made clear that “[a] person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person.” *Schmalfeldt v. Northe Pointe Ins. Co.*, 469 Mich. 422, 428 (2003). This means that the third party must be “directly referred to in the contract” before he or she is able to enforce it. *Id.* Plaintiff cannot meet that test. The indemnification policy that constitutes the alleged “promise” does not refer to her or any other individual attempting to wield a claim against a judicial officer of the Nineteenth District Court. Nor was it intended to benefit any such individual. Indeed, the policy states that it was designed to address “the unprotected exposure to potential civil liability” by court employees making employment decisions because such exposure would result in a “chilling effect upon the exercise of efficient and independent court administration.” Exh. C, at 1. Thus, on its face, the policy was ostensibly designed for the benefit of those individuals who worked for the Nineteenth District Court, not any member of the public who chose to sue it. And as the policy was adopted and applied, it was truly intended to

benefit only one person: Judge Somers. Plaintiff is not a third party beneficiary and has no right to enforce the indemnification policy on any such theory.

D. The Decision by the Court of Appeals Will Not Have Any Chilling Effect and Is Entirely Consistent with Sound Public Policy.

Finally, in an attempt to convince this Court that this case has far reaching implications of major significance to the state's jurisprudence, Plaintiff warns that the decision by the Court of Appeals "means that governmental agencies may no longer indemnify police officers, firefighters, teachers, judges, judicial staff and other public employees personally liable for gross negligence employment discrimination, violation of a citizen's constitutional rights or any other work related tort." Application, at 12-13. She predicts that this will "chill decision making and cause competent candidates to reject administrative appointment concomitant with such personal exposure." *Id.* at 21.

Plaintiff's dire prognostication will never come to pass. The ruling by the Court of Appeals doesn't limit the power of any "governmental agency," nor does it prevent a single public employee from being indemnified. It simply ensures, in the specific context of court administration, that there is a proper system of checks and balances in place to prevent a chief judge from single-handedly foisting a private liability on the taxpayers for his own personal misconduct. A judge must either obtain the approval of his or her funding unit for such indemnification, or demonstrate that it is essential to the operation of the court he or she serves. Far from "nullifying the statutory power of governmental agencies to indemnify public employees," the Court of Appeals' decision guarantees that indemnification decisions will be made responsibly and in furtherance of the public interest. Application, at 12. That is a laudatory outcome unworthy of disturbance by this Court.

CONCLUSION

There is no lawful basis to require the Nineteenth District Court to pay the judgment entered against Judge Somers in his individual capacity only. The Court of Appeals properly dismissed Plaintiff's garnishment claim. Accordingly, Garnishee Defendant-Appellee Nineteenth District Court respectfully requests that this Court summarily deny the pending application for leave to appeal.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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